In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 714

ESTATE OF ELEANOR BUCHANAN TALBOTT, DECEASED, BRYAN CARVER, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A11-A22) is not as yet officially reported. The opinion of the Tax Court (Pet. A1–A10) is reported in 48 T.C. 271.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1968. (Pet. A23.) The petition for a writ of certiorari was filed on November 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

327-260—68

QUESTION PRESENTED

Whether the corpus of a revocable trust created by the decedent prior to March 4, 1931, was excludable from her gross estate under Section 2036(b) of the Internal Revenue Code of 1954 as a pre-1931 "transfer" of property with a retained life estate, notwithstanding the fact that the transfer remained revocable in favor of the decedent until after 1931.

STATUTES INVOLVED

Section 2036 of the Internal Revenue Code of 1954, 26 U.S.C. 2036, is set forth in the petition, at pp. 2–3.

STATEMENT

Petitioner is the executor of the Estate of Eleanor Buchanan Talbott (decedent), who died on December 30, 1962. (Pet. A1, A12.) On July 5, 1923, decedent executed a trust under the terms of which the net income was payable to herself and her husband during their joint lives, and to the survivor for life. After the death of both, the corpus of the trust was to be paid over to four named beneficiaries or their survivors. The trust agreement provided that the decedent could, during her husband's life and with his consent, modify, alter, or revoke the trust in whole or in part; and that the surviving life income beneficiary could do so with the consent of Charles F. Talbott, one of the remaindermen. On October 3, 1932, and on April 10, 1933, the decedent with the consent of her husband revoked the trust in part. Decedent's husband died on November 15, 1935. Charles F. Talbott died on March 6, 1937. (Pet. A1–A4, A12.)

In 1943 decedent executed an instrument directing the manner in which the trustee was to apportion funds received from the distribution of specified bonds between the trust income and principal. In 1964, the Supreme Court of the State of New York entered a final accounting order which provided, *inter alia*, that the decedent had no authority to revoke the trust to the extent attempted in 1943. The trust was still in existence at the date of the decedent's death. (Pet. A4–A5, A12–A13.)

In the federal estate tax return filed on behalf of the decedent, petitioner excluded the value of the trust corpus. The Commissioner determined that the corpus was includible in the estate on the ground that the trust was an interest which decedent had transferred while retaining a life estate, which, under Section 2036(a) of the Internal Revenue Code of 1954, must be included in the estate. In a resulting suit for redetermination the Tax Court ruled for petitioner, holding that the trust came within the exception to section 2036(a), set forth in section 2036(b), for any "transfer made before March 4, 1931" (Pet. A1–A10). The court of appeals reversed, sustaining the Commissioner's position that section 2036(b) applies only to transfers that became complete and irrevocable before March 4, 1931. (Pet. A11–A20).[1]

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[1] A preliminary issue litigated below was whether the trust was to be treated as irrevocable because the decedent's power to amend or revoke it was exercisable only with the consent of her husband during their joint lives and thereafter with the consent of one of the remainderman. This issue turned on whether under the particular terms of the trust the husband

ARGUMENT

The decision below is correct and there is no direct conflict of decisions. Moreover, the question presented is an extremely narrow one, which can arise only with respect to a particular type of trust created more than 37 years ago, *i.e.*, a pre-1931 revocable transfer with a retained life estate, and no similar cases are now pending, and very few, if any, may be reasonably anticipated.

1. The legislative history and judicial background of the predecessor of section 2036(b) of the 1954 Code require the conclusion that the exception carved out in that section in favor of pre-1931 transfers with a retained life estate was not designed to cover revocable transfers, and applied only to those pre-1931 transfers which were complete and irrevocable on that date. Section 2036(a) of the Internal Revenue Code of 1954 provides that as a general rule the value of a decedent's gross estate shall include for federal estate tax purposes property transferred by gift during his lifetime if he retained the income for life. However, section 2036(b) provides that section 2036(a) "shall not apply to a transfer made before March 4, 1931." The narrow question presented in this case is whether the establishment of the trust by decedent was a completed transfer within the meaning of section 2036(b) when the legal title to the corpus passed from the settlor to the trust in 1923 and 1929, or did not become so until the remainder interest in the trust became irrevocable, which was after March 4, 1931.

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had a substantial adverse interest in the trust corpus, was decided by both courts below in the Commissioner's favor (Pet. A6–A7, A13–A15), and is not presented here.

The initial predecessor of section 2036(a) became law by Joint Resolution of Congress on March 3, 1931, c. 454, 46 Stat. 1516, which amended section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, relating to transfers in contemplation of or taking effect at death. The purpose was to set aside *Burnet* v. *Northern Trust Co.*, 283 U.S. 782, and related cases, where this Court held that the retention of a life interest in an irrevocable trust was not sufficient to bring the corpus of the trust into the settlor's gross estate. Following the passage of the Joint Resolution, the corpus of an irrevocable trust in which the settlor retained a life interest was includible in the settlor's gross estate. However, the Joint Resolution did not affect trusts which were irrevocable as of the date of its passage. See *Hassett* v. *Welch*, 303 U.S. 303.

Such was the law until 1949, when this Court in *Commissioner* v. *Estate of Church*, 335 U.S. 632, 660, 662, overruled *May* v. *Heiner*, 281 U.S. 238, on which the *Northern Trust* decision had been based, mooted the retroactivity question decided by *Hassett* v. *Welch*, *supra*, and held that the retention of income for life was enough to make a trust includible in the estate under the broad provisions of the Code that dealt with transfers intended to take effect at death. After the *Church* decision, Congress, in sections 7 and 8 of the Technical Changes Act of 1949, Act of October 25, 1949, c. 720, 63 Stat. 891, 894–896, granted some relief to those who had relied upon *May* v. *Heiner*, *supra*.[2]

[2] Under this Act, settlors of trusts who retained life income interests were permitted during 1949 and 1950 to surrender their life interests free of gift and estate tax, provided that the value of the corpus would not have been included in the settlors' estates

See S. Rep. No. 831, 81st Cong., 1st Sess., pp. 7–8. That Act also amended section 811(c) of the 1939 Code so as to separate the retention-of-income provisions from the provisions relating to transfers taking effect at death; and the retention-of-income provisions were placed in section 811(c)(1)(B), while the provisions relative to transfers taking effect at death were treated in other subdivisions of the statute. The retention-of-income provisions of section 811(c)(1)(B) were made inapplicable to transfers made prior to March 4, 1931, in the case of decedents dying prior to January 1, 1950. The latter restriction was eliminated by section 208 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615, thus making section 811(c)(1)(B) inapplicable to transfers made prior to March 4, 1931, regardless of when the settlor died. Section 811(c)(1)(B) as amended was carried forward into section 2036 of the 1954 Code without substantial change.

As the court of appeals pointed out, the facts that *May* v. *Heiner, supra,* and *Commissioner* v. *Estate of Church, supra,* had to do only with irrevocable trusts (Pet. A18–A19) and that the legislative history shows an intent to deal only with irrevocable trusts (Pet. A20–A21) constitute (Pet. A22) "overwhelming evidence that Congress intended in § 2036(b) to exclude only irrevocable pre-March 4, 1931, trusts from the operation of § 2036(a)." The resulting conclusion (*ibid.*) "that the word 'transfer' as used in

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by reason of the Joint Resolution of March 3, 1931, or section 811(d) of the 1939 Code (now section 2038 of the 1954 Code) if the settlor died on October 7, 1949.

§ 2036(b) means 'became irrevocable'," is in accord with that of the Court of Claims in *Smith* v. *United States,* 139 F. Supp. 305. It is also required by numerous decisions of this Court that a "transfer" is not deemed to have occurred if the transferor retains a power to revoke the transfer. *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339; *Corliss* v. *Bowers,* 281 U.S. 376; *Burnet* v. *Guggenheim,* 288 U.S. 280; *Porter* v. *Commissioner,* 288 U.S. 436; *Reinecke* v. *Smith,* 289 U.S. 172; *Estate of Sanford* v. *Commissioner,* 308 U.S. 39.

2. There is no substance in petitioner's contention (Pet. 8–10) that the term "transfer" appearing in section 2036(b) on its face has reference to revocable as well as irrevocable transfers. To begin with, it is elementary that for federal tax purposes a "transfer" of property ordinarily denotes a complete and permanent divestiture of economic benefits of ownership, not the transitory passage of legal title. *E.g., Reinecke* v. *Northern Trust Co., supra; Burnet* v. *Guggenheim, supra.* Furthermore, it is a familiar rule of statutory construction that the language of a statute, however clear and plain its meaning upon superficial examination, is to be read in the light of its legislative history and related statutory provisions, so as to "give effect to the intent of Congress". *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 542–544; see, also, *United States* v. *Dickerson,* 310 U.S. 554, 561–562; *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.,* 348 U.S. 437, 444; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479. As the court below took pains to point out (Pet. A15–A22),

the word "transfer" as used in section 2036(b), read in its statutory context and in the light of its legislative history and the judicial background, unquestionably has reference only to an *irrevocable* pre-1931 transfer in trust with a retained life estate.

3. The cases upon which petitioner relies in asserting a conflict (Pet. 5–7) are factually distinguishable. As the court below observed, both *Commissioner* v. *Ridgeway's Estate,* 291 F. 2d 257 (C.A. 3) and *Commissioner* v. *Canfield's Estate,* 306 F. 2d 1 (C.A. 2d), unlike *Smith* and the instant case, involved transfers which were irrevocable on March 4, 1931, "in the sense that the settlor could revoke the trust only for the benefit of others but not for himself" (Pet. A16–A17); indeed, the courts of appeals there distinguished those cases from *Smith* on that ground. Since here, as in *Smith,* the decedent could revoke in favor of herself, the instant case is similarly distinguishable from *Ridgeway* and *Canfield.* We recognize that both the Second and Third Circuits did, as petitioner points out (Pet. 6–8), suggest that, contrary to the decision here, they would hold that a trust that remained revocable after March 4, 1931, would nevertheless come within section 2036(b). The fact remains, nevertheless, that no court of appeals has so ruled, and the rationale of both the court below and the Court of Claims suggests that they would agree with the Second and Third Circuits in the case of a trust that became irrevocable by March 4, 1931; at the very least they have not decided otherwise.

4. In any event, the question presented lacks sufficient importance to warrant review by this Court. The issue relates to a limited and non-recurring type of transfer in trust: revocable trusts with a retained life estate created before March 4, 1931, and which remained revocable until after that date. Neither the Internal Revenue Service nor the Department of Justice is aware of any pending matter that raises the issue of the instant case. Thus, through the passage of time, the question has ceased to have any practical importance in the administration of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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